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No. 09-524

Supreme Court, U.S.
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In The

Supreme Court of the United States

NITRO DISTRIBUTING, INC., *et al.*,

Petitioners,

v.

ALTICOR, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

Respondents' Brief in Opposition offers no valid reason to deny review of the important and purely legal question presented: whether the Eighth Circuit correctly construed *Matsushita* when it held that direct evidence of the defendant's participation in an antitrust conspiracy is not sufficient, in and of itself, to create a jury question on the existence of an antitrust conspiracy.

I. REVIEW OF THE EIGHTH CIRCUIT'S INTERPRETATION OF *MATSUSHITA* IS NECESSARY TO BRING UNIFORMITY TO THE CIRCUITS

A. Petitioners' First Question Presents A Purely Legal Issue

Respondents' efforts to portray the Eighth Circuit's holding in this case as being "case-specific dictum" that will have no impact on future antitrust cases strain credulity. (Opp.Br. 1-2, 9, 14) Question No. 1 presents a pure question of law: whether the Eighth Circuit correctly construed *Matsushita* when it held that an antitrust plaintiff must satisfy the *Matsushita* standard even when the plaintiff has presented direct evidence that the defendant participated in an antitrust conspiracy. Because the Eighth Circuit's holding was based solely on its reading of *Matsushita,* that holding does not depend on any unique or specific facts. The court announced a black letter rule of law without regard to whether

the evidence Petitioners presented here was direct or circumstantial – a point driven home by the fact that the Eighth Circuit carefully avoided ruling on whether Petitioners' evidence was direct or circumstantial.[1] (*See* App. 11)

B. A True Conflict In The Circuits Exists On The Proper Interpretation Of *Matsushita*

Respondents' claim that there is no inter-circuit conflict is unpersuasive, particularly since the Eighth Circuit itself expressly recognized that the Third and Eleventh Circuits interpret *Matsushita* differently. (App. 10) It is most telling that in a section supposedly devoted to showing that there is no conflict among the circuits, Respondents instead focus entirely on arguing that the Eighth Circuit's interpretation of *Matsushita* is the *correct* one. (*See* Opp.Br. at 10-13) Respondents do not even attempt to refute that the Third, Fourth, Fifth, Seventh, Ninth and Eleventh Circuits adopted an interpretation of *Matsushita* that directly contradicts the Eighth Circuit's.

Respondents' argument that Eighth Circuit's interpretation of *Matsushita* comports with the First and Second Circuit's interpretation has the opposite

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[1] Had the Eighth Circuit believed Petitioners' evidence was entirely circumstantial as Respondents contend, it surely would have noted the lack of direct evidence.

of its intended effect. Rather than supporting the merits of the Eighth Circuit's decision, Respondents instead merely confirm the existence of a substantial split in the circuits.

A true conflict exists among the circuits as to the proper interpretation of *Matsushita* when direct evidence of an antitrust conspiracy is presented. The Eighth Circuit's new interpretation of *Matsushita*, which is at odds not only with a majority of circuits but with at least two Justices of this Court,[2] will undoubtedly vex future antitrust litigants and the courts until it is resolved.

C. Direct Evidence Cases Occur Frequently Enough That The Question Presented Should Be Finally Resolved

Respondents also suggest that cases presenting direct evidence are rare. But courts are routinely presented with claims involving direct evidence of antitrust conspiracy. In addition to the Eighth Circuit here, and the previously discussed *Rossi*[3] and *Champagne Metals*[4] cases from the Third and Tenth Circuits, just a small sample of such cases include:

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[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 585-86 (2007) (Stevens, J. and Ginsburg, J., dissenting).

[3] *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998).

[4] *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006).

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 765 (1984); *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 221 (3d Cir. 2008); *Tunica Web Advertising v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 410 (5th Cir. 2007); *United States v. Therm-All, Inc.*, 373 F.3d 625, 636 (5th Cir. 2004); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 460 n.22 (9th Cir. 1990); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 568 (11th Cir. 1999); *Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc.*, 527 F. Supp.2d 1257, 1301 (D. Kan. 2007). As is evident from this non-exhaustive list, direct evidence claims arise often enough to warrant resolution of this unsettled question.

D. This Case Is The Appropriate Vehicle To Resolve The Important Question Presented

There can be no better vehicle nor more opportune time to clarify the summary judgment standard when direct evidence of an antitrust conspiracy is presented.

First, Petitioners here have in fact presented direct evidence of Amway's participation in an antitrust conspiracy such that the Eighth Circuit's ruling is not dictum. Respondents attempt to divert the Court's attention from the fact that *Nitro* is a direct evidence case by arguing that Petitioners conceded to the district court "that their case was entirely

circumstantial,"[5] and that Petitioners "repeatedly told the district court that they lacked direct evidence of an antitrust conspiracy."[6] That is not so. In reality, Petitioners told the district court that they had no direct evidence of Amway's involvement only as to one particular overt act – Petitioners' wrongful suspension from Pro Net – an event that occurred over a year *after* Amway had already joined the conspiracy with Pro Net by creating the customer allocation agreement. Tr.46 ("Now again, Amway, we don't have any evidence of Amway's specific and direct involvement in the suspension, the pretextual suspensions."); Tr.51 ("When [Pro Net] suspended these people, [Amway's executives] were present. As George said, we don't have direct evidence exactly what they did, but they were there, Judge."). Petitioners never conceded they lacked direct evidence of Amway's active participation in the creation of the illegal Pro Net/InterNet customer allocation agreement. In fact, at the district court level, Petitioners never assigned "direct" or "circumstantial" labels to any of their evidence. Indeed, they had no obligation to do so.

Notably, Respondents' discussion of three of Petitioners' most damaging pieces of direct evidence is relegated to a footnote. (*See* Opp.Br. at 15 n.9). There, Respondents attempt to dismiss the sworn testimony of two of Amway's co-conspirators as being "vague,"

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[5] Opp.Br. at 2.

[6] Opp.Br. at 13-14.

and "opinion" testimony. (*See id.*) But a plain reading of the transcript shows otherwise.

In the same footnote, Respondents make another inaccurate representation, suggesting that Petitioners, by describing an individual as an "independent consultant," somehow conceded that he was not acting as Amway's agent when he engaged directly in conspiratorial conduct. But "independent consultant" and "agent" are not mutually exclusive terms. In fact, an independent (*i.e.*, non-employee) "consultant" *is* an agent for purposes of imputing liability to his principal. *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509, 518 (8th Cir. 1984); *Kwoun v. Southeast Missouri Professional Standards Review Organization,* 811 F.2d 401, 407 (8th Cir. 1987). The record reflects an abundance of compelling evidence that Amway's consultant was acting as its agent when he suggested, and then helped negotiate, the illegal customer allocation agreement.

Nitro is also a good vehicle for the Court to address the *Matsushita* standard because the facts on which Petitioners rely to show a conspiracy were largely uncontroverted by Respondents. Respondents argue that they were not required to controvert Petitioners' facts because they either were unsupported or failed to demonstrate a conspiracy. The first basis is wrong and the second is circular. The record reflects that every fact proffered by Petitioners was supported by affidavit, deposition testimony or other competent summary judgment evidence, and the trial court was given boxes of affidavits, deposition transcripts and

exhibits to support each fact. Those uncontroverted facts, if accepted as true as they were required to be, amply demonstrated a jury question on Amway's participation in an antitrust conspiracy.

Nitro also gives the Court an opportunity to forestall any confusion over the meaning of "independent action" as used in the *Matsushita* test. The Eighth Circuit's opinion can easily be read as holding that a defendant acts "independently" as long as its collusive activity is motivated by a desire to protect its own business. As Petitioners suggested in their Petition for Writ of Certiorari, however, this interpretation of *Matsushita* would eviscerate the antitrust laws because *every* defendant is motivated by a desire to protect its business. (*See* Pet. 16)

Last term, the Court examined a district court's authority to review the plausibility of a plaintiff's pleadings on a motion to dismiss. *See Iqbal v. Ashcroft*, __ U.S. __, 129 S.Ct. 1937 (2009). *Nitro* represents a next logical step: the contours of a court's authority to determine the plausibility of a plaintiff's antitrust conspiracy claims on summary judgment. For all these reasons, both the timing and the factual context of the case make *Nitro* the best vehicle for review of the important questions presented.

E. The Issue Presented In Question No. 1 Was Sufficiently Preserved For Appeal

Respondents also argue that review is inappropriate because Petitioners did not preserve the issue presented in Question No. 1 because "[t]hey made no direct evidence argument, nor did they even argue against application of *Matsushita*, until they reached the Court of Appeals." (Opp.Br., at 14). Once again, Respondents are wrong. An issue is preserved for appeal if it is a "narrow subset of 'a party's more general argument [when] no new evidence is presented on appeal.'" *Hartford Fire Ins. Co. v. Clark*, 562 F.3d 943, 946 (8th Cir. 2009).

Here, the issue of whether there was sufficient evidence to create a jury question on whether Amway joined an antitrust conspiracy was a central, heavily debated issue in the district court proceedings below. The *Matsushita* standard – which tests whether it is reasonable to infer the existence of an antitrust conspiracy from circumstantial evidence – is a narrow subset of Petitioners' general argument that their evidence was sufficient to avoid summary judgment. Petitioners were not required to expressly label their evidence as "direct" or "circumstantial" in order to preserve their argument that the courts below applied the wrong legal standard in rejecting their antitrust claims. Nor could Petitioners have possibly anticipated the Eighth Circuit's ground-breaking interpretation of *Matsushita*, which created a question worthy of this Court's review. The narrow question presented here did not even arise until the Eighth

Circuit broke rank with its sister circuits by adopting a contrary interpretation of *Matsushita*. For these reasons, and because Petitioners presented no new evidence on appeal that was not contained in the record presented to the district court, the issue presented in Question No. 1 was sufficiently preserved for review.

F. Neither Of The Alternative Grounds For Decision Compel Denial Of Review

Respondents' final argument is that review should be denied because the Eighth Circuit affirmed the trial court's entry of summary judgment on two independent grounds on which Petitioners do not seek review: (1) that the customer-allocation and price-fixing agreement was not illegal; and (2) that Netco and Schmitz Associates' antitrust claims are time barred.

As stated in Petitioners' Petition, the Eighth Circuit reached its ruling that the customer allocation agreement was not illegal by ignoring Petitioners' uncontroverted evidence. (*See* Pet. 10 n.10) Petitioners did not separately seek review on this issue because they recognized that such case-specific legal error does not create a certworthy question. However, if review is granted on the question presented, it would include this issue as a "subsidiary question fairly included" in the question of whether the summary judgment standard was misapplied to

Petitioners' antitrust claims *See Yee v. City of Escondido, California,* 503 U.S. 519, 535 (1992).

With respect to the time-barred antitrust claims of Netco and Schmitz Associates, Petitioners do not seek reversal of that decision. However, the court predicated dismissal of Petitioners' tortious interference claims on the failure of their antitrust claims. If summary judgment is reversed as to the antitrust claims, the tortious interference claims of all Petitioners, including those Netco and Schmitz & Associates (which are not time-barred), should also be reinstated.

II. THE EIGHTH CIRCUIT'S CREATION OF A *DE MINIMIS* COMPETITION THRESHOLD FOR HORIZONTAL COMPETITOR STATUS IN *PER SE* CLAIMS WARRANTS REVIEW

Respondents' opposition to this Court's review of Question No. 2 is similarly unpersuasive. They first argue that Petitioners conceded that Amway was not a horizontal competitor (*see* Opp.Br. at 17), and then in the very next breath themselves concede that Amway *does* compete horizontally. (*See* Opp.Br. at 18, admitting that Amway "may have produced motivational materials" but arguing that Amway's share of the BSMs market is not the same "level" as Pro Net's or InterNET's.) In truth, Petitioners never wavered from their position that Amway is a horizontal competitor in the separate BSMs business. The supposed "concession" quoted by Respondents is not to the

contrary. Petitioners' Counsel merely acknowledged that the Amway product business and the separate BSMs industry are each vertical distribution systems. (Opp. Br. at 17) But while Amway sold Amway products vertically through its product distribution system, it also competed *horizontally* with its alleged co-conspirators, Pro Net and InterNET, by producing and selling its own BSMs in competition with them, as Respondents expressly admitted in the record below. (*See, e.g.*, Pet. 21 n.14)

In their Opposition, Respondents make the same mistake as the Eighth Circuit in construing competition "at the same level of the market" as referring to the *quantum* of a defendant's market share rather than its *position* in the distribution chain (*e.g.*, manufacturer, wholesaler, or retailer). Amway undeniably competes "at the same level" as Pro Net and InterNET, because all of them are producers and sellers of BSMs. There is no recognized exemption from liability in a *per se* horizontal customer allocation or price fixing claim simply because one competitor's percentage share of the market is smaller than that of its alleged co-conspirators.[7] *See,*

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[7] In their Petition for Writ of Certiorari, Petitioners cited a particular document the Eighth Circuit overlooked in finding that Amway's market share was *de minimis*. (Pet. 17. n.15) Respondents counter that the document was "buried" in an "unsubstantiated argument" in Petitioners' Master Statement of Facts. In fact, this particular piece of evidence was separately described in Petitioners Statement of Fact No. 57, and the exhibit itself was provided to the trial court to support the fact

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e.g., Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 434-35 (1990) (recognizing that even a small competitor may cause antitrust injury).

Respondents attempt to confuse the issue by arguing that Amway has the lawful right to impose vertical restrictions on its Amway distributors. While that may be true, Petitioners, Pro Net and InterNET are not Amway distributors. They are legally separate corporations that engage in the BSMs business.[8] Amway's rules have no application to entities that are not Amway distributors, as Respondents themselves now concede is the law of the case. (*See* Opp.Br. at 18) Accordingly, when Amway, an admitted competitor in the production and sale of BSMs, actively helped its horizontal competitors, Pro Net and InterNET, make an agreement to allocate customers and fix prices, it violated the antitrust laws.

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asserted, as the summary judgment rules provide. Because Amway did not controvert that fact or any others, the Eighth Circuit was required to accept those properly supported fact(s) as true, and it was unnecessary for Petitioners to provide the Eighth Circuit with their several bankers boxes of supporting exhibits, transcripts and other documentation. If the Eighth Circuit nevertheless wished to examine any evidentiary support, it could have ordered the exhibits to be transmitted from the district court.

[8] Only Petitioner Netco operated both an Amway distributorship and a BSMs distributorship under the same corporate entity.

Respondents have asserted no valid basis for denying review of the issue presented in Question No. 2. Review of the Eighth Circuit's holding is necessary to return uniformity to the circuits on the principle that there is no minimum threshold of market share in *per se* claims of horizontal customer allocation and price fixing.

CONCLUSION

For these reasons, Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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